No. 122

In the Supreme Court of the United States

OCTOBER TERM, 1960

ARMANDO PIEMONTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

ARCHIBALD COX,
Solicitor General,
WILLIAM E. FOLEY,
Acting Assistant Attorney General,
BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys,
Department of Justice, Washington 25, D.C.

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CITATIONS

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OPINION BELOW

The opinion of the Court of Appeals (R. 49–52) is reported at 276 F. 2d 148.

JURISDICTION

The judgment of the Court of Appeals was entered on February 29, 1960 (R. 53) and a rehearing was denied on May 3, 1960 (R. 54). The petition for a writ of certiorari was filed on June 2, 1960 and was granted on October 10, 1960 (R. 54), 364 U.S. 811. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner understood that he had been granted immunity and that he would be subject to punishment for contempt if he persisted in refusing to testify before the grand jury.

2. Whether the procedure followed in applying the immunity statute (18 U.S.C. 1406) was proper.

3. Whether petitioner's liability in contempt for refusing to testify before the grand jury is affected by the fact that he was subsequently indicted by the same grand jury for an independent violation of law.

STATUTE INVOLVED

18 U.S.C. 1406 (part of Section 201 of the Narcotic Control Act of 1956), 70 Stat. 574, provides:

> Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—
>
> (1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,
>
> (2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), or
>
> (3) the Act of July 11, 1941, as amended (21 U.S.C., sec. 184a),
>
> is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall

be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

STATEMENT

Petitioner, having been previously granted immunity from prosecution under 18 U.S.C. 1406, was held in contempt for willfully refusing to obey the District Court's order to testify before a grand jury investigating violations of federal narcotic laws (R. 38). He was sentenced to imprisonment for 18 months (R. 42). The Court of Appeals unanimously affirmed (R. 53).

On August 10, 1959, petitioner appeared as a witness before the federal grand jury in the Northern District of Illinois (R. 1, 4). He was then serving a six year term for two sales of heroin (R. 4).

When asked to inform the grand jury where he obtained the heroin, he declined to answer, claiming his privilege under the Fifth Amendment (R. 5). He stated, at the same time, that he had been permitted to consult with his counsel. Upon being questioned further about the narcotics business, the selling of marihuana, his acquaintance with persons dealing in narcotics and the possible sources of heroin, he again claimed the privilege (R. 5–8).

On August 13, 1959, the government applied to the court for an order, pursuant to 18 U.S.C. 1406, *supra*, directing petitioner to answer the questions (R. 9–10). The application stated that the grand jury was investigating illegal trafficking in narcotics and that petitioner, when questioned on matters relating to the federal narcotic laws, had claimed the privilege against self-incrimination (R. 9). A supporting affidavit of the United States Attorney stated that it was in the public interest that petitioner be granted immunity, and that the submission of the application was approved by the Attorney General (R. 10–12).

At the hearing on the application, the government presented a transcript of the grand jury proceeding (R. 14–15). The District Judge expressed doubt as to whether the privilege applied to those questions "concerning the heroin for the sale and possession of which" petitioner was convicted, "but as far as all of the rest of the testimony that you referred to, I certainly think that it would tend to incriminate the witness * * *" (R. 15). The government then filed the application (R. 15), and the court, finding it to be "in proper form," ordered it "granted" (R. 16).

The court explained to petitioner (R. 16):

> * * * Pursuant to the application * * * I find that you are a necessary and material witness to the Grand Jury investigation * * *
>
> * * * And in accordance with the provisions of the Narcotic Control Act, this Court now grants you immunity from prosecution which might arise from any answers that you give to this Grand Jury concerning the matter of their investigation.
>
> It, therefore, is no longer necessary for you to invoke the protection of the Fifth Amendment to protect yourself from incrimination or subsequent prosecution, because pursuant to the provisions of the Narcotic Control Act, I now grant you immunity from such prosecution and direct you to answer the questions propounded to you by the Grand Jury.

The court then inquired whether petitioner understood the order and petitioner replied, "Yes, sir, your Honor" (R. 16). Petitioner asked whether he could talk to his lawyer, and the court directed that the grand jury interrogation be suspended "until tomorrow morning, after the witness has had an opportunity to confer with his attorney" (R. 16–17). The court admonished petitioner that, upon failure to abide by the order, he would be cited for contempt (R. 17). Once again, the judge stated (*ibid.*):

> You are at this time, however, granted immunity from prosecution and directed to answer the questions. * * * .

On the same date, a written order was signed by the court. It states in pertinent part that petitioner properly asserted his constitutional privilege against

self-incrimination in declining to answer the questions put by the grand jury, and concludes (R. 13):

> It is Therefore Ordered that the said Armondo Piemonte if and when called before the Grand Jury to testify and produce evidence before said Grand Jury relative to the aforementioned inquiry of said Grand Jury, that the said Armondo Piemonte shall not be excused from testifying or producing evidence before said Grand Jury on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, but shall answer said questions.
>
> This order is made in accordance with Section 1406, Title 18, United States Code.

On August 14, 1959, petitioner again appeared before the grand jury. He acknowledged as correct the assertion of the government's attorney that the judge "granted you immunity and ordered you to answer questions propounded to you before this Grand Jury concerning narcotics" (R. 18). Thereafter, however, petitioner declined to answer the questions on the ground that the answers would tend to be incriminating (R. 19–22).

On August 14, 1959, the court entered an order to show cause why petitioner should not be held in criminal contempt (R. 27–28). The order recited that the court, after hearing, had found the application of the government proper, had ordered petitioner to answer the questions propounded on August 10, 1959; that petitioner was granted immunity as provided in 18 U.S.C. 1406; and that, on August 14, 1959, with petitioner present in open court, the court

had been advised that petitioner had refused to answer the questions (R. 27–28).

On August 18, 1959, a hearing was had on the order to show cause (R. 29). Petitioner was represented by counsel (R. 29). The government's case consisted of the transcripts of testimony before the grand jury (R. 30). Petitioner's counsel, who had read the transcripts and discussed the questions with petitioner (R. 30), introduced some newspaper articles and complained that his client's testimony was not being kept secret (R. 30–32), but the court noted that the newspaper contained only matter discussed in open court (R. 32).

Petitioner took the stand and explained the basis for refusing to answer the propounded questions as follows (R. 33):

> Well, I am doing time in the penitentiary. I fear for my life. I fear for the life of my wife, my two step-children, and my family. I can't do something like that. I want to live, too.

In summation, counsel argued (R. 36–37) that the "real basis" for petitioner's refusal to testify was "his fear of safety for himself and his family." The court commented (R. 38):

> It may well be his real reason, but that is not a legal reason for failure to obey my order.

Before imposing sentence the court, twice asked petitioner whether he persisted in his refusal to obey the order, and petitioner indicated that he would not answer the questions (R. 38, 40).[1]

[1] On September 2, 1959, the grand jury indicted petitioner and 12 others in one count for conspiring to violate the narcotic laws (R. 43–48).

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On February 29, 1960, the court of appeals unanimously affirmed the contempt finding, stating (R. 51) that the "record clearly demonstrates that Piemonte understood what questions he was ordered to answer." The Court of Appeals observed that Judge Campbell had been very patient with the witness and had given him many opportunities to testify, but that petitioner had steadfastly refused (R. 52). It also held (R. 52) that, though the District Court itself could not give immunity, "the statute granted the immunity and the manner in which Judge Campbell expressed that immunity was not in any way confusing to Piemonte."

SUMMARY OF ARGUMENT

I

Petitioner contends in this Court (although he did not make the argument in the District Court) that there was a lack of clarity in the order which he was charged with disobeying. An examination of the District Court proceedings demonstrates that this claim has no foundation.

When petitioner was first called before the grand jury (which was investigating narcotics traffic), he claimed the privilege against self-incrimination. The prosecutor and the District Judge had doubts as to whether the privilege had been validly claimed in all instances, since it appeared that certain of the questions which petitioner had refused to answer related to transactions for which petitioner had already been convicted. No effort was made, however, to segregate matters as to which the privilege might not be available from the many other matters which were admit-

tedly subject to a claim of privilege. Instead, the prosecutor decided, in the interest of obtaining all of petitioner's testimony, to present an application to grant petitioner immunity under the Narcotic Control Act of 1956.

Since the District Judge approved the application to grant immunity, the only relevant consideration, for present purposes, is whether the accompanying order made it clear that petitioner would be required, upon his reappearance before the grand jury, to answer all questions put to him in connection with the matters under investigation. The court told petitioner that he was being granted immunity, that it would no longer be necessary to invoke the privilege, and that he would be protected "from prosecution which might arise from any answers that you give to this Grand Jury concerning the matter of their investigation." This was unmistakably plain, and petitioner acknowledged that he understood. The court also warned petitioner that a failure to comply with the order would subject him to punishment for contempt. Finally, the court arranged for petitioner to consult with his lawyer prior to resumption of the grand jury proceedings.

Nevertheless, petitioner again refused to testify when the grand jury proceedings were resumed. An order to show cause why he should not be held in criminal contempt and a hearing on that issue ensued. At that hearing, petitioner, who was represented by counsel, advanced no claim that he had failed to understand the court's order to testify. Instead, petitioner's counsel contended that the real reason for

petitioner's reluctance to comply was his fear of underworld reprisals. If, in fact, there had been any confusion or misunderstanding on petitioner's part, that could have been readily corrected at the contempt hearing. The judge expressed complete willingness to afford petitioner another opportunity to testify.

Although petitioner does not renew in this Court his argument to the District Judge that one who is in fear of reprisal should not be required to testify, we believe it appropriate to state our reasons for believing that the District Court properly rejected this contention. Acceptance of claims of that kind would encourage widespread recalcitrance by witnesses. Even more serious, it would put the courts in the position of sacrificing the processes of the law to the threats of the lawless. Government, to be sure, has the duty to take appropriate steps to protect persons who reasonably apprehend danger; but it also has the duty to protect the citizenry at large by insuring that law enforcement shall not be at the sufferance of those who are prepared to make threats in order to suppress evidence. The performance of the one does not require or justify the abandonment of the other.

II

There were no technical defects in the grant of immunity.

A. Petitioner quarrels with the District Court's statement, "I now grant you immunity." It is true that the immunity is conferred by operation of the statute when the judge approves the application and that the judge is an instrument by which immunity

is conferred rather than its source. It does not follow, however, that the judge's phraseology was misleading or prejudicial.

B. Contrary to petitioner's argument, it is plain from the face of the Narcotic Control Act that the immunity provision of that statute covers transactions involving marihuana as well as transactions involving other narcotics.

C. Petitioner argues that it does not affirmatively appear that he saw the court's written order directing him to testify. But since petitioner was ordered to testify in open court, it is immaterial whether he was in fact served with the written order, entered the same day, which did no more than confirm the order as orally announced.

D. The argument that the District Judge did not make "findings" before granting immunity is without substance. The judge is not required to determine whether it is in the public interest to grant immunity. The executive branch performs that function. *Ullmann* v. *United States*, 350 U.S. 422, 432–434. The court must find only that the application is in proper form. The District Court made a specific finding that it was. And petitioner does not challenge the proposition that the application did in fact meet all the statutory requirements.

III

The indictment of petitioner for narcotics violations does not bear on his liability for the contempt previously committed and punished.

One directed to testify under the immunity statute is accorded immunity in relation to those matters

concerning which he in fact testifies. But even if the statute could be read to grant immediate and unconditional immunity in relation to matters concerning which he is *directed* to testify, it could not conceivably confer immunity from the consequences of a willful refusal to obey the directive. Such disobedience is, by any standard, a contempt.

Petitioner also argues that he was a *de facto* defendant when initially called by the grand jury. If the record supported this (which we dispute) and if petitioner, in ignorance of his rights, had proceeded to testify before the grand jury (in fact, he asserted his privilege and refused to testify), there would be some basis in precedent for arguing that the *indictment* subsequently returned by the grand jury was tainted. But the point would in all events be irrelevant to the *contempt* issue now before this Court. For present purposes, the significant point is that petitioner assuredly had a privilege to remain silent when he appeared before the grand jury (whether he be considered an ordinary witness or a putative defendant), but lost that privilege when granted immunity. The whole purpose of the immunity statute is to provide a means for securing the testimony of one who has "claimed his privilege against self-incrimination" in a grand jury or court proceeding (Section 1406, *supra*, pp. 2–3). It is particularly designed to secure, when deemed necessary in the public interest, the testimony of those who may, themselves, be implicated in crime.

ARGUMENT

I. PETITIONER UNDERSTOOD THE REQUIREMENTS WHICH FLOWED FROM THE GRANT OF IMMUNITY AND THE DIRECTION TO TESTIFY

We turn, first, to the question whether the record in this case provides any basis for a claim that petitioner failed to understand the order which he was charged with disobeying.

A. Petitioner suggests that there was confusion as to which questions he was being directed to answer, or could be required to answer pursuant to the order granting immunity. This claim, we believe, is specious.

To be sure, when petitioner first appeared (on August 10, 1959) before the grand jury, the prosecutor was of the view that petitioner could not validly claim the Fifth Amendment privilege in relation to transactions for which he had already been convicted. But the prosecution did not thereafter seek an order directing petitioner to answer those particular questions. Anxious to question petitioner concerning many aspects of the narcotics traffic, the prosecutor, instead of attempting to segregate a few questions as to which, arguably, no claim of privilege would attach, chose to apply for an order granting the petitioner a broad immunity in respect of the entire matter under investigation by the grand jury. This course was hardly surprising. One of the purposes of immunity statutes, from the beginning, has been "to forestall the obstruction and delay incident to judicial determination of the validity of the witness'

claim * * *." *United States* v. *Monia*, 317 U.S. 424, 428.

It is also true that the District Judge, when the matter came to his attention, expressed doubt whether petitioner had a valid claim of privilege in relation to all of the questions which had been put to him. The judge did not, however, proceed to rule upon this matter or to direct that certain questions be answered. Any issue as to whether the privilege was available in relation to particular questions disappeared from the case when the prosecutor advised the court that he was seeking the judge's approval of an application to confer immunity upon petitioner. Once immunity was granted, there was no necessity to decide whether the earlier claim of privilege had been properly asserted in all instances.

B. The significant consideration, for present purposes, is that the grant of immunity and the accompanying order to testify placed petitioner in an unmistakably plain position—that of being required to answer all of the questions propounded by the grand jury. He could have had no doubt on this score.

In granting immunity on August 13, 1959, the District Judge explicitly stated (R. 16), "this Court now grants you immunity from prosecution which might arise from any answers that you give to this Grand Jury concerning the matter of their investigation." The court continued (*ibid.*), "It * * * is no longer necessary for you to invoke the protection of the Fifth Amendment to protect yourself from incrimination or subsequent prosecution, because pursuant to the

provisions of the Narcotic Control Act, I now grant you immunity from such prosecution and direct you to answer the questions propounded to you by the Grand Jury." Petitioner was asked if he understood, and he replied affirmatively (*ibid.*). The court then advised petitioner that, if he failed to abide by the order upon the resumption of the grand jury proceedings, he would be subject to punishment for contempt. In light of this colloquy, there can be no doubt that petitioner was plainly informed that he was being granted full immunity in relation to the matters under investigation by the grand jury, and that there was no further basis for any fear of incrimination or basis for any further claim of privilege.

The court also arranged for petitioner to see his lawyer prior to resumption of the grand jury proceedings. If any confusion persisted after the hearing of August 13, 1959—and the record affords no basis whatever for this supposition—the matter could have been clarified at that juncture. But no claim of confusion was made or brought to the attention of the District Judge. Counsel sought no further audience.

C. When petitioner, upon his reappearance before the grand jury, persisted in his refusal to testify, the District Court issued an order to show cause why he should not be held in criminal contempt. At the hearing which followed (on August 18, 1959), petitioner was represented by his counsel. His counsel claimed that petitioner's statements before the grand jury had not been kept secret. He argued, also, that the real reason for petitioner's reluctance to testify was that

he was fearful of his safety and of his family's safety. These contentions, upon which the District Court ruled, have not been renewed on appeal.

Conversely, none of the questions which are urged in this Court were presented to the District Court. The claim of confusion was not even remotely suggested. Certainly, this was not the result of any unwillingness on the part of the District Court to hear full argument. As the Court of Appeals observed (R. 52), "Judge Campbell was very patient * * *." Moreover, the District Judge, at the conclusion of the contempt hearing, immediately before he imposed sentence, again afforded petitioner an opportunity to go before the grand jury and to testify. Still, petitioner advanced no suggestion that he did not understand what he would have to do in order to comply with the court's order. Petitioner simply declined.

Thus, even if one could credit the claim that petitioner was confused at the August 13 hearing when he was first ordered to testify, there can be no satisfactory explanation of the fact that, at the contempt hearing on August 18, petitioner and his counsel failed to make any claim of confusion, to seek further instructions, or to take advantage of the proffered opportunity to purge the contempt.

One may go further. The reason which was offered by petitioner as the explanation for his refusal—his alleged fear of underworld reprisal if he testified freely—negates the belated suggestion that he had doubts as to the meaning of the court's order directing him to testify.

D. Although petitioner does not argue the point in this Court, it may be appropriate to note that the claim advanced in the District Court, *i.e.*, that petitioner should not be required to testify because of his fear of reprisals, is one which never has been considered a legal excuse. A witness's claim that he fears reprisal is seldom susceptible of proof or disproof, and the acceptance of such claims would invite widespread recalcitrance. There is an even more important reason for rejecting the argument. Courts of law can function effectively only so long as they are unhampered in the pursuit of truth. Above all, they cannot bow to the threats of the lawless. This is not to deny the government's obligation to consider the safety of its citizens and to furnish them protection when necessary. It is to assert, rather, that the obligation to protect the safety of the citizen cannot properly be fulfilled by a sacrifice of the law's processes. The duty of the citizen to aid in the enforcement of the law by giving testimony must be preserved intact. See *Brown* v. *Walker*, 161 U.S. 591, 600; *United States* v. *Monia*, 317 U.S. 424, 432 (dissenting opinion). That is vital to the safety of all citizens.[*]

[*] It should be noted that, if petitioner was excused from testifying under the grant of immunity because of fears for his safety, all witnesses summoned to testify—whether under an immunity statute or as an ordinary witness at a judicial proceeding—would be similarly excused. The claim that personal fear excuses a witness from refusing to testifying is not, and cannot be, restricted to persons called under an immunity statute.

II. THERE WERE NO TECHNICAL DEFECTS IN THE GRANT OF IMMUNITY

A. Petitioner complains (Br. 18) that the District Court, in explaining the immunity to petitioner, used the words "this court now grants you immunity" and "I now grant you immunity." The contention that this invalidated the grant of immunity is frivolous. To be sure, it is the statute itself which confers the immunity, conditional upon testifying, once the application has been presented and approved. This hardly signifies that the manner in which the judge explained the ruling to petitioner—in terms calculated to be intelligible to him—was misleading or prejudicial. The record is barren of even a suggestion that there was any confusion. If petitioner's lawyer had questioned the phraseology, or had asked for clarification, the judge would undoubtedly have phrased his remarks in a more formal manner, *i.e.*, that petitioner was being given immunity under the statute. No objection was made. And, since the government's application under the statute had in fact been granted, the explanation by the judge did not alter the legal effect of the action taken. The nub of the matter is that petitioner had been granted immunity, as he well knew.

B. Petitioner's suggestion that questions concerning marihuana fall outside the immunity statute (Br. 12) is without merit. Section 1406, *supra*, pp. 2–3, provides immunity as to the testimony of any witness involving "any violation of—(1) * * * part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 * * *" Part II is entitled "marihuana" (26 U.S.C. 4741 *et seq.*) and is devoted exclusively to

marihuana. Also, immunity is granted in respect of "any violation of—* * * (3) the Act of July 11, 1941, as amended". This in turn refers to "any substance" taxed under subchapter A of chapter 39, which includes marihuana (21 U.S.C. 184a(b)). Thus, violations involving marihuana are plainly covered by the immunity provision of the Narcotic Control Act of 1956.

C. Petitioner argues that there was a lack of supporting findings in the court's order granting immunity and that it does not affirmatively appear that the written order of August 13, 1959 (confirming the order of the same date orally announced in open court) was seen by petitioner.[3]

There is no requirement that an order directing a witness to testify be in writing. If there is no defect in the order announced in open court, it is immaterial whether petitioner actually saw the written order, which simply confirmed the court's order as orally announced.

D. Petitioner's contention as to "findings" is without substance. Under the statute, the District Court has no occasion to determine whether a grant of immunity is in the public interest; the judge's role is confined to a determination whether the application is in proper form. *Ullmann* v. *United States*, 350 U.S. 422, 432–434. After Judge Campbell had read the application submitted by the prosecutor, had examined the grand jury transcript, and had heard counsel, he stated (R.

[3] Reference to the oral and written orders (compare R. 12–13 with R. 16) shows that there was no significant variation between the two.

16), "I find the petition in proper form. The same is granted." No further finding is required,[4] and the only relevant inquiry is whether the application did in fact meet the formal statutory requirements. The application is before the Court (R. 9–12) and petitioner does not contend that it fails in any respect to meet the statutory requirements.

III. THE INDICTMENT OF PETITIONER FOR NARCOTICS VIOLATIONS DOES NOT RETROSPECTIVELY RELIEVE HIM OF HIS LIABILITY FOR CONTEMPT

We consider, finally, petitioner's suggestion that his indictment by the grand jury for a violation of the narcotics laws somehow served to purge his earlier contempt.

A. Under the immunity provision of the Narcotic Control Act (as well as under other immunity statutes), one acquires immunity by testifying, not by refusing to testify. The statute affords protection in respect of "any transaction, matter, or thing concerning which [the witness] is compelled * * * to testify or produce evidence", and it also covers the "testimony so compelled." Since petitioner refused to testify, he did not meet the condition upon which immunity is granted. Had he first refused to comply with the court's order and later undertaken to do so, his testimony would have become a bar to indictment, but it still would not have excused a prior contempt.

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[4] *Corona* v. *United States*, 250 F. 2d 578 (C.A. 6), cited by petitioner, stands only for the proposition that the District Court is to determine whether the application meets the statutory requirements. As observed in the text, that determination was made in the instant case.

In other words, the government is not put to an election until the testimony is given.

B. Even if the statute could be read to leave room for the argument that an order directing a witness to testify confers an immediate and irrevocable immunity even though the witness refuses to testify, the most that could be contended is that the witness thereby obained immunity from prosecution for those transactions in relation to which he was directed to testify. If the government were thus held to have made an election when the order to testify was entered, it was obviously an election to proceed down the road of securing the testimony and punishing any defiance as contempt.[5] Thus the petitioner can at most use the order as a plea in bar of the indictment. The indictment affords no basis for contending that he is to be relieved from the consequences, *i.e.*, punishment for contempt, which flow from his refusal to do the very thing which prompted the grant of immunity.[6]

C. Petitioner says that he was a *de facto* defendant when called by the grand jury and that this is confirmed by the fact that he was ultimately indicted. He also suggests that putative defendants have an "absolute" privilege not to testify. From these contentions, he would apparently draw the conclusion that he could not be required to testify pursuant to

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[5] Note that the statute specifically provides (*supra*, p. 3): "No witness shall be exempt under this section from prosecution for perjury or contempt while giving testimony or producing evidence under compulsion as provided in this section."

[6] Although we believe that petitioner does not have a valid plea in bar of the indictment, we recognize, of course, that in the event petitioner is convicted under the indictment, the sentencing court, in imposing punishment, may take into account the sentence which has been imposed for the contempt.

a grant of immunity. There are several defects in this argument.

To begin with, so far as this record shows, petitioner was not a primary target of the grand jury's inquiry when he was called. It does not appear that the purpose was to induce him to incriminate himself, rather than to secure information in relation to other persons.

Moreover, those cases which raise a question as to the propriety of calling before a grand jury the person against whom an indictment is sought have no application here for a further reason. The source of concern in cases of that type is that the person called may have been unaware of his rights and may have been improperly induced to accuse himself out of his own mouth.[7] The instant case, however, is one in which petitioner, upon being called, refused to testify before the grand jury. Manifestly, he sacrificed none of his rights, and the indictment, even if it were now before the Court, could not be deemed tainted by overreaching on the part of the prosecutor.

In all events, a suggestion that putative defendants should be accorded special safeguards in relation to grand jury inquiries can have no proper application to a contempt case in which immunity is tendered and the order to testify is thereupon disobeyed. The stat-

[7] For a full discussion of those cases, see the majority and concurring opinions in *United States* v. *Scully*, 225 F. 2d 113 (C.A. 2). The government's views on this issue were elaborated in its brief in *Halperin* v. *United States*, Oct. Term, 1956, No. 184, pp. 90–97. This Court found it unnecessary to reach the point in that case, decided *sub nomine Grunewald* v. *United States*, 353 U.S. 391.

ute explicitly assumes that there is or may be a valid claim of privilege (Section 1406, *supra*, pp. 2–3, becomes operative after the witness has "claimed his privilege against self-incrimination" in a "case or proceeding before [a] grand jury or court of the United States"), and on that assumption provides procedures by which a comprehensive immunity may be substituted for the privilege to the end that the public may obtain the benefit of testimony which would otherwise be withheld. If immunity procedures could not be invoked in the case of one who may himself be implicated in crime and may accordingly be a potential or a possible defendant, the statute would be set virtually at naught. In short, we agree that petitioner had grounds for asserting privilege in the first instance, but believe that this cannot detract from the conclusion that he had no privilege after immunity from prosecution was granted under Section 1406. Indeed, his is the very type of case at which the statute is directed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

ARCHIBALD COX,
Solicitor General.
WILLIAM E. FOLEY,
Acting Assistant Attorney General.
BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys.

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